TABLE OF CONTENTS

PAGE

Opinion, United States Court of Appeals for the Second Circuit, dated May 15, 2003..... 1a

Bar Order, Injunction and Dismissal with Prejudice of Claims Against BDO Dunwoody, United States District Court, Eastern District of New York, dated January 7, 2002 ..... 27a

Partial Final Judgment, United States District Court, Eastern District of New York, dated January 8, 2002 ..... 32a

Bar Order, Injunction and Dismissal of Claims Against HSBC Bank Canada and Ronald Driol, United States District Court, Eastern District of New York, dated January 8, 2002 ..... 34a

Partial Final Judgment, United States District Court, Eastern District of New York, dated January 8, 2002 ..... 41a

Decision, United States District Court, Eastern District of New York, dated October 26, 2001 ..... 43a

Report and Recommendation of United States Magistrate Judge A. Simon Chrein, United States District Court, Eastern District of New York, dated April 24, 2001 ..... 46a

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: February 3, 2003 Decided: May 15, 2003)

Docket Nos. 02-7023 (Lead), 02-7026 (Con), 02-7083 (Con), 02-7084 (Con), 02-7143 (Con), 02-7147 (Con) and 02-7215 (Con)

MICHAEL GERBER, HOWARD MAYER and BARRY W. FELDMAN,

Plaintiffs,

FRED KAYNE, OPPENHEIMER & CO., a Delaware Corporation, as custodian for Fred Kayne Individual Retirement Accounts, STEPHEN KAYNE, DON WOHL, MILTON T. OKUN, ROSEMARY OKUN, GLENN TOBIAS, MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware Corporation, as CUSTODIAN for Milton T. Okun Individual Retirement Accounts, KEN BERG, ROBERT A. BRONSTEIN, BRONSTEIN FAMILY TRUST, BRUCE BURNAM, MARCIA BURNAM, KATHLEEN A. COHEN, WILLIAM CORBETT, CUTLER FAMILY TRUST OF 1989, MARTIN GOLDFARB, RICHARD GUNTHER, HARPEL PARTNERS, L.P., HARPEL WHEELOCK PARTNERS, L.P., HARPEL INTERNATIONAL, LTD., RICHARD L. MILSNER, JOEL RUMM, VICTOR SCARAVILLI and TRI S PARTNERS and TODD ELLIS, JOSEPH MEYER, LEONA

MOGA, TERRY SCHULTZ, EDDY SHERMAN, KENNETH STEINER, AUDREE YORKES, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

—v.—

MTC ELECTRONIC TECHNOLOGIES CO., LTD.,

Defendant-Counter-Defendant-Appellant,

BDO DUNWOODY WARD MALLETTE,

Defendant-Third-Party-Plaintiff-Appellee,

ALAN LEUNG,

Defendant-Cross-Claimant,

HSBC BANK CANADA and RON DRIOL,

Third Party-Defendants-Cross-Claimants-Appellees,

MIKO LEUNG, H.J. MEYERS & CO., INC. and SIT WA LEUNG,

Defendants-Cross-Defendants,

—v.—

DAIWA SECURITIES AMERICA, INC.,

Defendant-Cross-Claimant-Appellant,

ROBERT C. FARR; PETER JENSEN; THOMAS LENAGH; EDILBERTO V. POZON; GOODWIN WANG; DAVID WONG,

Defendants-Counter-Defendants-Appellants,

LEVESQUE SECURITIES, INC., MERIDIAN SECURITIES INTERNATIONAL LIMITED, MAURICE LEE, CANACCORD CAPITAL CORP., FIRST CANADA SECURITIES, LEIB ORLANSKI, FRESHMAN, MARANTZ, ORLANSKI, COOPER & KLEIN, HARLEY GLECKMAN and WALL STREET FINANCIAL CORP.,

Defendants.

Before:

JACOBS, POOLER and SOTOMAYOR,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (John Gleeson, *District Judge*), approving settlements between defendants-appellees BDO Dunwoody, HSBC Bank Canada and Ron Driol and plaintiffs-appellees.

Appellants, the non-settling defendants, challenge the district court's approval of the settlements, arguing that the district court's order relating to the allocation of a judgment credit impermissibly creates a risk that the non-settling defendants will not receive the full credit to which they are entitled, and that the bar order approved by the district court extinguishing claims of the non-settling defendants against the settling defendants is both overbroad and non-reciprocal. They also contend that the district court impermissibly deferred resolution of the exact amount of the judgment credit until trial, and that the district court erroneously held that the PSLRA does not apply to this action. We hold that the district court

correctly deferred allocation of the judgment credit until after trial, and approve the bar order with a modification to ensure that any claims by the non-settling defendants with independent damages are not extinguished. We also hold that the PSLRA does not apply to the claims of the nineteen plaintiffs who were added by amendment to the complaint after the statute's effective date. Because the district court did not fully consider the competing equities of a mutual as compared to a non-mutual bar order, we vacate the district court's entry of a non-mutual bar order in the BDO settlement and remand for further consideration.

Affirmed in part as modified, vacated in part and remanded.

LAWRENCE H. NAGLER, Nagler & Associates, Los Angeles, CA (David F. Berry, of counsel), *for plaintiffs-appellees*.

GARY P. NAFTALIS, Kramer Levin Naftalis & Frankel LLP, New York, NY (Alan R. Friedman, Stephen M. Sinaiko, Jennifer L. Rochon, J. Wells Dixon, of counsel, Bruce S. Kaplan, Friedman Kaplan Seiler & Adelman LLP, New York, NY, on the brief), *for defendant-cross-claimant-appellant Daiwa Securities America, Inc. and defendants-counter-defendants-appellants MTC Electronic Technologies Co., Ltd., Robert C. Farr, Peter Jensen, Thomas Lenagh, Edilberto V. Pozon, Goodwin Wang, and David Wong*.

GREGORY A. MARKEL, Cadwalader, Wickersham & Taft LLP, New York, NY (Paul R. Bessette, Austin, TX, on the brief), *for defendant-third-party-plaintiff-appellee BDO Dunwoody.*

SOTOMAYOR, *Circuit Judge*:

Defendant-cross-claimant-appellant Daiwa Securities America, Inc. ("Daiwa"), defendants-counter-defendants-appellants MTC Electronic Technologies Co., Ltd. ("MTC") and Robert C. Farr, Peter Jensen, Thomas Lenagh, Edilberto V. Pozon, Goodwin Wang, and David Wong (collectively "the individual defendants") appeal from a judgment of the United States District Court for the Eastern District of New York (John Gleeson, *District Judge*) approving partial settlements between plaintiffs-appellees and defendants-appellees BDO Dunwoody ("BDO"), and HSBC Bank Canada ("HSBC") and Ron Driol, an HSBC executive.

Appellants (collectively "the non-settling defendants") contend that the district court erred in approving the partial settlements without ensuring that their settlement judgment credit would be at least the total amount paid by the settling defendants and by deferring determination of the exact amount of the credit until trial. They also take issue with the district court's approval of a settlement bar order extinguishing any claims against BDO relating to or arising from the allegations of this litigation. According to the non-settling defendants, any bar order should be narrowed to include only indemnity and contribution claims, and should also impose a reciprocal bar on claims by BDO. Alternatively, the non-settling defendants argue that at least with respect to the settle-

ment of the claims of those plaintiffs added by amendment to the complaint after the effective date of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.), the bar order must be mutual.

We affirm the district court's orders in part. We hold that the court's deferral of the allocation of particular settlement amounts to various elements of damages for purposes of calculation of the non-settling defendants' judgment credit was not erroneous, and conclude that, in light of the concessions made by plaintiffs on appeal, the non-settling defendants will receive a credit that is at least the settlement amount for common damages. We also affirm, with a slight modification, the district court's bar order extinguishing the claims of the non-settling defendants for indemnity and contribution, and any other claims where the damage to the non-settling party is measured by its liability to the plaintiffs for claims relating to this action. We vacate and remand that part of the district court's order relating to the mutuality of the bar order because we find that the magistrate judge, whose recommended ruling the district court adopted, did not fully consider the competing equities involved in the mutual and non-mutual rules. Finally, we agree with the district court that the PSLRA does not apply to any of the added plaintiffs in this action, which was commenced prior to that statute's effective date.

BACKGROUND

I. The Litigation

MTC was a company based in British Columbia that purportedly had binding joint ventures regarding the

operation, manufacture and sale of telecommunications equipment in China. Plaintiffs are a group of investors who purchased shares of MTC common stock between 1992 and 1994. MTC allegedly raised over $70 million in a secondary offering in 1993, which was underwritten by defendant Daiwa. Defendant BDO Dunwoody ("BDO") was MTC's auditor during the time period at issue. Plaintiffs allege that MTC's purported telecommunications joint ventures were fraudulent and materially misrepresented. As a result, plaintiffs claim to have incurred trading losses in MTC stock of more than $15 million.

Nine of the named plaintiffs filed suit against MTC, its principals (Miko Leung and Sit Wa Leung), various MTC officers and directors (the individual defendants), Daiwa and BDO in the Central District of California on January 23, 1995, alleging securities fraud, RICO violations and state law claims of fraud, negligent misrepresentation, and breach of fiduciary duty ("the *Kayne* action"). Because plaintiffs' allegations were similar to those of two class actions then pending against MTC in the Eastern District of New York, the *Kayne* action was transferred to Judge Gleeson by the Judicial Panel on Multidistrict Litigation for coordinated pre-trial proceedings. Plaintiffs moved to amend their complaint to add seventeen additional plaintiffs in April 1996, and two more in March 1997. The individual defendants and BDO filed third-party claims against HSBC and Ron Driol, an HSBC officer, alleging that they assisted in the misappropriation of MTC stock by the Leungs. Plaintiffs then sought leave to add HSBC and Driol as defendants. That motion was denied, and the plaintiffs filed a state court action in California asserting federal RICO and state common law fraud claims against HSBC and Driol. These claims were consolidated with a California state

court action that had previously been filed by the seventeen plaintiffs who were added to the federal action in April 1996, and both state court actions were stayed pending the outcome of the proceedings before Judge Gleeson. The two original MTC class actions settled; this action remains pending in the Eastern District of New York before Judge Gleeson.

II. The Settlements

In late 2000, plaintiffs reached an $8 million settlement with BDO purporting to allocate $4,907,975.50 to out-of-pocket damages and $3,092,024.50 to pre-judgment interest. Plaintiffs also reached a $4,075,000 settlement with HSBC and Driol, allocating $1,300,000 to out-of-pocket damages, $819,000 to prejudgment interest, and $1,956,000 to attorneys' fees (which are recoverable under RICO). In exchange, plaintiffs agreed to release BDO, HSBC and Driol for all claims they might have against the settling defendants in any forum, related in any way to the MTC litigation.

These settlements were submitted to the district court for approval, and were referred to Magistrate Judge Chrein for a recommended ruling. The settling parties sought an order finding that the settlements were good faith settlements under California and federal law, barring claims by the non-settling defendants while preserving the claims of the settling defendants, dismissing the claims pending in the Eastern District of New York, and approving the allocation of damages while leaving the determination of any judgment credit for the non-settling defendants until after trial. Although plaintiffs had made settlement contingent on the district court's adoption of their specific allocations, they subsequently agreed to finalize the settlements if the propriety of the

allocations within the settlement figure was left to the trial judge.

III. Rulings Below

In a recommended ruling, Magistrate Judge Chrein held that a "capped proportionate share" rule would determine the amount of the judgment credit to which the non-settling defendants are entitled on the state and federal claims. Under such a rule, the credit is the *greater* of the settlement amount for common damages or the settling defendants' share of liability as proven at trial. The magistrate judge observed that this "rule ensures that no matter how the settlement funds are distributed as between damages and other elements, the non-settling defendants will never be required to pay more than their proportionate share of an award as determined by the trier of fact."

The magistrate judge also rejected the non-settling defendants' argument that the PSLRA applied to the claims of the nineteen plaintiffs who joined the suit by amendment after the statute's effective date. The magistrate judge found that the PSLRA did not apply to those plaintiffs because the *Kayne* action was "commenced" on the date they filed the original complaint, not the date the plaintiffs were added.

Finally, the magistrate judge held that a bar order extinguishing "any claims arising out of or reasonably flowing from the claims and allegations in the Kayne Action" was proper because the non-settling defendants would be adequately protected by the judgment credit. With respect to whether the bar order should also bar the settling defendants from asserting contribution or indemnity claims against the non-settling defendants, the magistrate judge noted that a district court in this Circuit had

previously held that settling defendants should be allowed to seek contribution from non-settling defendants to achieve equitable apportionment of damages among defendants. *See In re Del-Val Fin. Corp. Sec. Litig.*, 868 F. Supp. 547, 563-64 (S.D.N.Y. 1994). While expressing concern that "[a] rule which allows settling defendants, who are buying 'peace of mind' and avoiding the costs and risks of litigation, to seek contribution from [the non-settling] defendants who bore the risk [of litigation] . . . seems unfair," the magistrate judge stated that he "fe[lt] obliged to follow the only precedent in this Circuit especially given that the [non-settling defendants] were on the receiving end of this benefit in the [prior] class settlement." The magistrate judge then approved those portions of the bar orders preserving the settling defendants' claims against the non-settling defendants.

The parties filed objections and requests for clarification, which were considered by the district court. Judge Gleeson adopted the magistrate judge's recommendations in their entirety with one modification, holding that "if a judgment is obtained against a non-settling defendant, the judgment reduction shall not necessarily be calculated by using the full amounts of the settlements. Rather, allocations of amounts within those gross figures (to damages, prejudgment interest and attorneys' fees) shall be subject to the discretion of the trial court."

MTC, the individual defendants, and Daiwa have appealed. Plaintiffs have responded to the appeal on the question of the calculation of the judgment credit, the district court's deferral of that calculation, and the applicability of the PSLRA. BDO has responded on the issue

of the scope and non-mutuality of the bar order and the applicability of the PSLRA.[1]

DISCUSSION

I. Standard of Review

"A court can endorse a settlement only if 'the compromise is fair, reasonable and adequate.' " *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1026 (2d Cir. 1992) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982)). This Court has also observed that "where the rights of one who is not a party to a settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval." *Id.* Although the district court normally has discretion to approve a settlement, we may review the district court's decision *de novo* where an appellant's challenge to the authority of the district court to approve the settlement raises novel issues of law. *Id.*

II. The Judgment Credit

We begin by noting the first of several issues that are not in dispute in this appeal. No party challenges the magistrate judge's determination that the non-settling defendants' judgment credit will be calculated using a "capped proportionate share" formula. Under this rule, the credit given for the settlements will be the greater of the settlement amount for common damages (a "*pro tanto*" rule) or the "proportionate share" of the settling defendants' fault as proven at trial. Although we do not

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[1] The individual defendants and Daiwa have settled with HSBC and Driol.

hold that such a formula is required, we agree with the magistrate judge's conclusion that the cap, which ensures that a judgment credit is at *least* the amount of the settlement for common damages, complies with this Circuit's "one satisfaction" rule, which prohibits a plaintiff from recovering more than "one satisfaction for each injury." *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989); *see also Masters*, 957 F.2d at 1030 ("[W]here a settlement and a judgment compensate a plaintiff for the same injury, a nonsettling defendant is entitled to a judgment reduction at least in the amount of a prior settlement.").[2] By awarding a credit that is at least the settling defendants' proven share of liability, the non-settling defendants' rights are protected even without a determination of the fairness of the settlement. *See id.* at 1029 ("Because the credit determination [under a proportionate fault method] is made after a

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[2] In Singer, the plaintiff had sued two parties for related securities fraud and RICO claims in separate lawsuits in New York and Illinois. Singer, 878 F.2d at 598-99. The plaintiff prevailed against one party at trial on the securities claims, for a total damages award of approximately $3,000,000 including prejudgment interest; the RICO claim was dismissed before trial. Id. The plaintiff then settled with the other defendant for $1,250,000. Id. at 597. The district court credited the full amount of the settlement toward the judgment, and the plaintiff appealed, arguing that the settlement of the second action included settlement of the RICO claim, which might have exposed the defendant to treble damages. As a result, the plaintiff sought to offset the settlement against a hypothetical trebled damages award (using the actual damages awarded at trial), which would have resulted in the first defendant receiving no benefit from the set-off. Id. at 600. We rejected this argument, "declin[ing] to journey with [the plaintiff] down this road of speculation" because there had been no adjudication that anyone was liable to the plaintiff on the RICO claim:

determination of liability, the proportionate method is always consistent with fault.").

Despite the parties' agreement on the method of calculation of the credit, the non-settling defendants argue that the district court's orders create a possibility that they will receive less than the full amount of the settlement as a judgment credit, allegedly in violation of the one satisfaction rule. They also contend that they are entitled to know the amount of their credit, not merely the method of calculation, before trial. For the reasons that follow, we disagree.

The settling parties here attempted to allocate the settlements to three elements of "damages" purportedly suffered by the plaintiffs: out-of-pocket damages, prejudgment interest, and attorneys' fees.[3] On appeal, plaintiffs have conceded that in any of three possible scenarios, the judgment credit will be at least the full

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> Although . . . the settling defendant may well have considered its possible exposure to treble damages in deciding to settle, it would be entirely speculative for us, absent a finding of liability on the RICO claim, to treble in the settled Illinois case the actual damages awarded in the tried New York case.

Id. at 601. Here, in contrast to *Singer*, plaintiffs are headed to trial against the non-settling defendants on the RICO and state law claims under which they seek attorneys' fees and prejudgment interest. Thus, whether there will be an award entitling plaintiffs to recover these elements of damages may not be speculative. For our purposes, *Singer* suggests that where a plaintiff loses on a claim at trial, the plaintiff cannot allocate a portion of the settlement to damages for that losing claim in order to reduce a non-settling defendant's judgment credit; instead, the judgment credit is to be the full amount of the settlement for common damages.

[3] The references to "damages" as allocated in the settlements and the district court's orders are somewhat unclear. The entire settlement amount is a payment of "damages" by the settling defendants

amount of the settlement for common damages. First, if plaintiffs prevail at trial on claims that entitle them to prejudgment interest (the state law claims, and, at the discretion of the trial court, the federal securities claims) or attorneys' fees (the RICO claims), they do not disagree that the non-settling defendants may use any amounts the district court allocates to these elements of damages to set off their liability on those elements respectively. Further, plaintiffs have also agreed that if the settlement money allocated to prejudgment interest exceeds the jury's award on this element, "any remaining portions can be used to offset out-of-pocket damages." Brief for Plaintiffs-Appellees at 12. (The plaintiffs presumably would concede the same with respect to the portion of the settlement allocated to attorneys' fees.) Finally, plaintiffs have acknowledged that they cannot allocate *any* of the settlement to attorneys' fees or prejudgment interest if plaintiffs do not prevail on claims entitling them to these types of damages:

> If . . . it is determined [that] Plaintiffs are *not* entitled to prejudgment interest, *all portions of the settlements allocated to prejudgment interest could be used as an offset against any award of out-of-pocket damages.* The same holds true for the attorneys' fees portion of Plaintiffs' settlement with the Bank if Plaintiffs do not prevail at trial on their RICO claims against the Non-settling Defendants.

Id. (emphasis added). As plaintiffs have conceded that the judgment credit will be at least the full amount of the settlement, regardless of how these various elements of

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to the plaintiffs. Within the broad category of damages, the allocation was to out-of-pocket damages, attorneys' fees and prejudgment interest.

damages are allocated at trial, the non-settling defendants' fears that they will receive less than their full settlement credit or that the one satisfaction rule will be violated are unfounded.[4]

Despite these concessions, the non-settling defendants express concern that the district court held that "if a judgment is obtained against a nonsettling defendant, the judgment reduction shall not necessarily be calculated by using the full amounts of the settlements." The district court's order is accurate, however, insofar as only the portion of the settlement attributable to *common* damages will be credited. *See Masters*, 957 F.2d at 1031 ("Absent a showing that damages are not common, a nonsettling defendant whose rights against settling defendants are to be barred is entitled to judgment reduction at least in the amount paid by all settling parties."); *Singer*, 878 F.2d at 600 ("[W]hen a plaintiff receives a settlement from one defendant, a nonsettling defendant is entitled to a credit of the settlement amount against any judgment obtained by the plaintiff against the nonsettling defendant as long as both the settlement and judgment represent common damages.").

We also conclude that the non-settling defendants are not entitled to any greater degree of certainty about the amount of their judgment credit than they already have. Consistent with *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 157 (4th Cir. 1991), relied upon by the non-settling defendants, the district court's orders informed the parties well before trial of the method that

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[4] Inasmuch as no party has articulated any reason that the credit should be allocated in any particular way among the various elements of damages, we leave this issue, as well as the fairness of the allocations that the settling parties originally agreed upon, for the district court to consider after trial if necessary.

will be utilized to calculate the set-off. The non-settling defendants know that they will get a credit amounting to the greater of (1) the settlement attributed to common damages, or (2) the settling defendants' proportionate share of the total damages. They therefore know that the settling defendants' wrongdoing is relevant, and can develop their trial strategy accordingly. We find no error in the district court's decision to leave the determination of the actual amount of the judgment credit for calculation at trial because the non-settling defendants will get at least the full settlement amount as a credit, unless the settlement damages are not common, an issue which is obviously contingent on the outcome of the trial.[5]

Accordingly, we construe the bar orders approved by the district court, consistent with plaintiffs' concessions on appeal and with *Singer*, as indicating that the non-settling defendants' judgment credit will be the greater of the settling defendants' proportionate share of liability

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[5] We note two issues relating to the commonality of damages that may be relevant to the trial court's calculation of the judgment credit. Plaintiffs have argued that if the non-settling defendants prevail at trial on their theory that they are only responsible for a particular set of injuries that are distinct from the damages caused by the settling defendants, and therefore are not held jointly and severally liable for the harm caused by the settling defendants, there would be no basis for granting a judgment credit in the full settlement amount because the settlement would not represent "common" damages. In addition, plaintiffs maintain that if only some of them were to prevail at trial, the judgment credit should be the greater of (1) the amount that the prevailing plaintiffs received of the settlement, or (2) the settling defendants' proven share of liability, again because the one satisfaction rule bars recovery for a particular plaintiff only to the extent that the plaintiff has already received compensation for his proven damages. We take no position on these issues at this time.

or the amount of the settlements attributable to common damages, regardless of how the settlement amounts are ultimately allocated or re-allocated among out-of-pocket damages, prejudgment interest and attorneys' fees. So construed, the orders are affirmed as they relate to the calculation of the judgment credit.

III. Scope of the Bar Order

With respect to the scope of the bar order entered by the district court, the parties' disagreement is again quite limited. The non-settling defendants do not dispute that the district court properly barred their contribution and indemnification claims. *See Masters*, 957 F.2d at 1031-32 (approving settlement bars of claims for indemnity and contribution if the non-settling defendant received a judgment credit of at least "the amount paid by settling defendants toward damages for which the nonsettling defendant would be jointly and severally liable"). They also clarified at oral argument that a "disguised" contribution or indemnity claim, such as a negligence claim where the injury to the non-settling defendants was their liability to the plaintiffs, could be barred. Instead, the non-settling defendants argue that the district court's bar order is too broad in that it extinguished "independent" claims, including claims arising from comfort letters issued by BDO to Daiwa in connection with underwriting of the 1993 secondary offering. The settling defendants, in turn, claim that they seek to bar only those claims where damages are calculated based on the non-settling defendants' liability to the plaintiffs. In a potentially contradictory position, however, BDO also maintains that it is entitled to a broader bar of any claims related to the transaction giving rise to its

involvement in this litigation, namely, the certification of MTC's financial statements.[6]

In *Masters*, we addressed the extinguishment of indemnity and contribution claims under a *pro tanto* recovery rule, and required a hearing on the fairness of the settlement to "protect the due process rights of third parties" in recognition of the possibility of collusion between the settling parties. 957 F.2d at 1031. Under the capped proportionate share rule adopted by the courts below, however, no such fairness hearing is necessary because the non-settling defendants' credit will be the *greater* of the proportionate fault or the settlement amount. By ensuring that, at the end of the day, the non-settling defendants are not held responsible for any damages for which the settling defendants are proven liable, the judgment credit adequately compensates the non-settling defendants for their indemnity and contribution claims, as well as for any other claims where the harm to the non-settling defendants is based on their liability to the plaintiffs. *See id.* at 1029-31.

Daiwa argues that the bar order impermissibly extinguishes "independent claims" that do not relate to any duty owed by BDO to plaintiffs, but rather involve a relationship between BDO and Daiwa based on the issuance of the comfort letters by BDO to Daiwa. If, however, Daiwa proves at trial that it acted as it did in reasonable reliance on BDO's comfort letters, the jury's

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[6] The individual defendants and Daiwa reached a settlement with HSBC and Driol, but MTC—which apparently has not settled with these parties—has joined in the arguments made by the individual defendants and Daiwa. We therefore discuss both the BDO and HSBC/Driol settlements, although we note that several arguments relate solely to the relationship between Daiwa and BDO.

apportionment of liability to BDO, and the judgment credit that results from that apportionment, will adequately protect Daiwa for any damages it owes to plaintiffs. To the extent that Daiwa and the other non-settling defendants were injured by their reliance on the comfort letters *only* inasmuch as they owe damages to plaintiffs as a result of that reliance, those claims were properly extinguished.

This resolution of the scope of the bar order corresponds with BDO's position that those claims where damages are calculated based on the non-settling defendants' liability to the plaintiffs should be barred. More problematic is BDO's alternative position that it is entitled to peace of mind on all claims arising out of the duties it may have breached with respect to the certification of the MTC financial statements, without regard for whether Daiwa might have a claim for damages that goes beyond its liability to the plaintiffs. It may well be, as BDO argues, that the non-settling defendants are only damaged to the extent they are liable to the plaintiffs in the underlying litigation. If, however, Daiwa were to prove that it sustained independent reputational damages or losses relating to the cost of defense arising out of a breached contractual or fiduciary relationship with BDO, it has not been compensated for those losses by the judgment credit, and any such claims should not be extinguished. *See TBG, Inc. v. Bendis*, 36 F.3d 916, 928 (10th Cir. 1994) ("Courts that have allowed bar orders have only barred claims in which the damages are 'measured by' the defendant's liability to the plaintiff. Besides contribution and indemnity claims, these include any claims in which the injury is the nonsettling defendant's liability to the plaintiff. No court has authorized barring claims with independent damages." (citations omitted)); *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 495-96 (11th

Cir. 1992) (holding that the district court properly barred fraud and negligence claims against the settling defendants because those claims were simply another theory for recovering the damages the non-settling defendant had to pay to the plaintiff). The issue, in other words, is less one of independent "claims" than independent "damages."

We express no view on the likely merit of any claims for independent damages that the non-settling defendants may assert. We also recognize that the orders' reference to claims "arising out of or reasonably flowing from the claims or allegations in the *Kayne* action" may have been intended to encompass only claims where damages are based on liability owed by the non-settling defendants to the *Kayne* plaintiffs. In light of the position taken by BDO in this appeal, and in the absence of any finding from the courts below that no such claims exist, however, a modification to the bar orders is necessary to ensure that the only claims that are extinguished are claims where the injury is the non-settling defendants' liability to the plaintiffs.[7] Accordingly, the BDO settlement order approved by the district court is modified as follows:

> Each of the Non-Settling Defendants is hereby permanently BARRED, ENJOINED and RESTRAINED from commencing, prosecuting, or asserting any claim *for indemnity or contribution* against BDO *(or any other claim against BDO where the injury to the Non-Settling Defendant is*

[7] We have the authority to "affirm, modify, vacate, set aside or reverse any . . . order of a court lawfully brought before [us] for review . . . ." 28 U.S.C. § 2106; see, e.g., Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002) (affirming the judgment of a district court with a modification).

the Non-Settling Defendant's liability to the plaintiffs), arising out of or reasonably flowing from the claims or allegations in the *Kayne* action, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the *Kayne* action, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere (collectively, the "Barred Claims"). These Barred Claims include, but are not limited to, any and all claims arising out of or reasonably flowing from "comfort letters" issued to Non-Settling Defendant Daiwa by BDO in connection with MTC, *to the extent that the injury to the Non-Settling Defendant under any such claim is its liability to the* Kayne *plaintiffs*.[8]

IV. Non-Mutuality of the Bar Order

The non-settling defendants also object to the fact that the bar orders are "non-mutual," in that they bar the non-settling defendants from bringing contribution and indemnity claims against settling defendants without imposing a reciprocal bar on the settling defendants, which remain free to seek indemnity or contribution from the non-settling parties. According to the non-settling defendants, if the settling defendants "overpaid for the privilege [of avoiding the risks and expenses of further litigation in this case, they] should not be able to recover from Non-Settling Defendants who undertook those risks and expenses by choosing to defend rather than accede to plaintiffs' demands."

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[8] To the extent necessary to protect the rights of any parties to this appeal, the district court is instructed to make a similar modification to the HSBC/Driol settlement bar order.

In approving the entry of the non-mutual bar orders here, the magistrate judge cited *In re Del-Val Fin. Corp. Sec. Litig.*, 868 F. Supp. 547, 563-64 (S.D.N.Y. 1994), in noting that "[o]ne court in this Circuit has considered the issue and determined that settling defendants should be allowed to seek contribution from non-settling defendants, reasoning that reduction by the [capped proportionate share] rule adheres to the one-satisfaction rule while permitting settling defendants to seek contribution fosters equitable apportionment of damages among defendants." The magistrate judge then expressed concern that such a rule "seem[ed] unfair" because it allowed the "settling defendants, who are buying 'peace of mind' and avoiding the costs and risks of litigation, to seek contribution from other defendants who bore the risk in the event they settled for too much." The magistrate judge, however, then stated that he "fe[lt] obliged to follow the only precedent in this Circuit especially given that the [non-settling defendants] were on the receiving end of this benefit in the class settlement," and recommended approval of a non-mutual bar.

The magistrate judge's expressed view that he was "obliged" to follow a non-binding district court decision, notwithstanding his concern that such a rule "seem[ed] unfair," convinces us that a remand for further consideration of the issue is warranted. Before approving a non-mutual bar order, the magistrate judge should have balanced the competing equities.

Ordinarily, in settling a case, the defendant bears the risk of overpayment and the plaintiff bears the risk of accepting a damages award lower than what would have been proved at trial. Each side may benefit from the possibility that the other side has paid too much (or accepted too little), and is sure to benefit from the assur-

ance of a fixed payment. The risk is evenly distributed to both settling parties. The one satisfaction rule, however, complicates this balancing where there are multiple defendants but only a partial settlement: if the plaintiff settles with one defendant and goes to trial against another, it loses any benefit from the possibility that the settling defendant overpaid, because the judgment credit ensures that the plaintiff will not recover more than its total *proven* damages. As a result of the one satisfaction rule, if the settling defendant overestimates its proportion of plaintiff's damages, the non-settling defendant pays the plaintiff less than that non-settling defendant's proven liability. The question, then, is whether non-settling defendant should be entitled to the benefit of the settling parties' miscalculation. Although neither of the two possible rules is entirely unproblematic, a mutual rule may avoid creating incentives for collusion between the settling parties, while not putting the settling defendant at any unfair disadvantage.

Under BDO's suggested non-mutual method, the settling defendant knows that it will never pay more than its proportionate fault, because it can seek contribution from the non-settling defendant in the event that its settlement payment is for more than its proportionate fault. The settling defendants thus obtain the benefit of a cap on exposure without any risk that they will have overpaid. The non-settling defendants will have to pay exactly their share of the harm as proven at trial, regardless of the settlement amount, because the non-settling defendants will have to pay back any judgment credit that exceeds their proven liability to the settling defendants on a claim for contribution. The settling plaintiffs bear the risk that they will settle for too little, because even where the defendants are joint tortfeasors, the capped proportionate share rule requires the non-settling

defendants to pay only up to their proportionate fault, thus exposing plaintiffs to a potential shortfall in recovery. Both the settling defendant and the plaintiff would an incentive to establish that the settling defendant is less at fault, creating a possibility of collusion between the settling parties because the settling defendant would be able to increase the amount of contribution it was entitled to by showing that the non-settling defendant was more at fault, and the plaintiff would want to avoid a situation in which the proportionate share of the settling defendant was found to be greater than the settlement amount.

In contrast, under the non-settling defendants' proposed mutual rule, a settling defendant retains the risk that it will settle for more than its proportionate share of the harm ultimately proved at trial; in exchange, its maximum exposure is limited to the amount for which it settles. The settling plaintiffs are in the same position as under BDO's proposed non-mutual rule. Under the mutual rule, however, the non-settling defendants obtain a potential windfall if the settling defendants settle for more than their proportionate share of the harm, because the non-settling defendants' judgment credit is the *greater* of the settlement amount or the settling defendants' proven proportionate share of liability under the one satisfaction rule. On the other hand, there is no analogous risk of collusion. The settling defendant remains no worse off than if the one satisfaction rule were not in place.

On remand, the district court should consider whether, under the circumstances of this case, which include the possibility that the non-settling defendants benefitted from a similar non-mutual order in the prior settlement of the class-action claims, a non-mutual or a mutual bar

order is most fair to all the parties involved. We also note that the PSLRA has resolved this dilemma in favor of mutual bar orders. *See* 15 U.S.C. § 78u-4(f)(7). While, for the reasons discussed below, we conclude that the PSLRA does not control the outcome of this pre-PSLRA case, the congressional determination that a mutual bar order was the better approach may have some bearing on the district court's resolution of this issue. Finally, we also recognize that at oral argument, counsel for BDO repeatedly indicated that BDO desired a non-mutual bar in order to be allowed to pursue claims against MTC and its parent corporation, Grande Holdings, and *not* Daiwa. This too may be relevant to the district court's consideration as to the scope of any non-mutual bar order on remand.

Accordingly, we vacate and remand that portion of the district court's order approving a non-mutual bar order in the BDO settlement for further consideration and balancing of the competing fairness issues.

V. Applicability of the PSLRA

Finally, the non-settling defendants argue that the bar orders must be mutual for the claims of the nineteen plaintiffs who were added by amendment to the complaint after the effective date of the PSLRA. The district court properly rejected this argument.

Section 108 of the PSLRA provides that the PSLRA's provisions relating to settlement "shall not affect or apply to any private action [brought under the Securities and Exchange Act of 1934] commenced before and pending" on December 22, 1995. 109 Stat. 737, 758 (1995). This statutory language refers to "actions," not to "claims."[9] We agree with the district court's conclusion that the

[9] The non-settling defendants rely on Adler v. Berg Harmon Associates, 790 F. Supp. 1235 (S.D.N.Y. 1992), which held that a

"action" here was commenced when the complaint was filed on January 23, 1995. *See* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."). Amending the complaint, even to add additional plaintiffs, did not create a new action. *See McKowan Lowe & Co. Ltd. v. Jasmine, Ltd.*, 976 F. Supp. 293, 297 (D.N.J. 1997). In the absence of any indication to the contrary, we doubt that Congress intended that courts would apply different sets of substantive and procedural rules to groups of plaintiffs asserting identical claims in a single action, depending on when those plaintiffs were added to the complaint. The district court's ruling is therefore affirmed on this issue.

CONCLUSION

In summary, we affirm the bar orders with respect to the settlement judgment credit as construed in light of plaintiffs' concessions on appeal, deny the non-settling defendants' request for greater clarification as to the amount of their judgment credit, modify the language of the bar orders to extinguish only those claims for which the harm to the non-settling defendants is their liability to the plaintiffs, and vacate and remand the bar orders only on the issue of the non-mutuality of the orders.

The parties are to bear their own costs.

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statute permitting reinstatement of civil actions commenced prior to June 20, 1991 did not permit the reinstatement of the claims of a group of plaintiffs who were added by amendment to the original timely complaint after June 20, 1991. Although Adler observed that "[t]he plain language of the statute permits reinstatement only of claims commenced prior to June 20, 1991," id. at 1238, we find that the distinction between "actions"—the phrase actually used in both statutes—and "claims" is significant, and therefore disagree with Adler's reasoning.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.:
93-CV-0876 (JG)

In re MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

95-CV-2499 (JG)
MDL No. 1059

THIS DOCUMENT RELATES TO
FRED KAYNE, et al.

—v.—

MTC ELECTRONIC TECHNOLOGIES
CO., LTD., et al.

BAR ORDER, INJUNCTION AND DISMISSAL WITH PREJUDICE OF CLAIMS AGAINST BDO DUNWOODY

On April 24, 2001, after the matter had come on for hearing on January 23, 2001, Chief United States Magistrate Judge A. Simon Chrein issued a Report and Recommendation (the "R&R") on the motion of Defendant BDO Dunwoody ("BDO") to determine, among other things:

(1) Whether the settlement between Plaintiffs in *Kayne, et al., v. MTC Electronic Technologies Co., Ltd. et al.*, Case No. CV-95-2499 (MDL No. 1059) ("*Kayne*") and BDO (the "Settlement") is a good faith settlement under federal law and California law;

(2) Whether, as a result of the Settlement, an order should issue barring all claims against BDO arising out of, in connection with or in any way related to *Kayne* or the allegations therein ("Bar Order");

(3) Whether, as a result of the Settlement, an injunction should issue barring any party from proceeding in any forum with any claim against BDO that is barred or would be barred by a Bar Order; and

(4) Whether, as a result of the Settlement, an order should issue dismissing any and all claims, cross-claims, counterclaims and third party complaints against BDO currently pending before this Court, whether in actions originally filed in this Court or in actions transferred to this Court for consolidated or coordinated pretrial proceedings (the "Motion").

As used herein, "'Non-Settling Defendants' include[s] (1) all defendants, cross-defendants, counter-defendants and third party defendants [other than BDO] in the *Kayne* Action and any related actions pending before this Court, the Class Actions,[1] the Officers and Directors Actions,[2] and the Grande Holdings Actions;[3] and (2) any

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[1] *In re MTC Electronic Technologies Shareholder Litigation*, Case No. CV-93-0876; *Ellis, et al. v. Leung, et al.*, Case No. CV-94-1763.

[2] *Farr, et al. v. Hongkong Bank of Canada, et al.*, Case No. CV-96-3129, *Farr, et al. v. Hongkong Bank of Canada, et al.*, Case No. CV-96-3130.

[3] *BDO Dunwoody, v. The Grande Holdings Limited*, Case No. CV-97-4950; *Daiwa Securities America Inc. v. The Grande Holdings Limited*, Case No. CV-98-0336.

other person or entity notified directly or through counsel of this motion." (R&R, at 6 n.4.)

The Court, having considered the papers filed by BDO and Plaintiffs in support of the Motion, the papers submitted by MTC, Daiwa, and the "Non-Leung Individual Defendants" in opposition thereto, the R&R, the objections thereto, and such other and further evidence and argument presented, by Order dated October 26, 2001 adopted the R&R in its entirety with one clarification. (Order, Oct. 26, 2001, at 3.) Pursuant to that order adopting Judge Chrein's R&R, the Court enters the following order:

NOW, THEREFORE, IT IS ORDERED THAT:

1. Each of the Non-Settling Defendants is hereby permanently BARRED, ENJOINED, and RESTRAINED from commencing, prosecuting, or asserting any claim against BDO arising out of or reasonably flowing from the claims or allegations in the *Kayne* action, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the *Kayne* action, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere (collectively, the "Barred Claims"). (R&R at 20, 25-26.) These Barred Claims include, but are not limited to, any and all claims arising out of or reasonably flowing from "comfort letters" issued to Non-Settling Defendant Daiwa by BDO in connection with MTC. (R&R at 25.)

2. All claims against BDO in the consolidated cases before the Court are hereby DISMISSED with prejudice.

3. This Court has not reached, and is not deciding, the issue of whether the Plaintiffs and BDO have reached a good-faith settlement under California law. (R&R at 20.)

4. Any judgment obtained by Plaintiffs in the *Kayne* action against any of the Non-Settling Defendants, or any party other than BDO, shall be reduced by the greater of (a) the amount of BDO's settlement attributed to damages, or (b) the proportionate share of the injury attributable to BDO, as shall be determined at trial. (R&R at 17, 20, 26.) Allocation of amounts within BDO's settlement (to damages, prejudgment interest, and attorneys' fees) shall be subject to the discretion of the trial court. (Order, Oct. 26, 2001, at 3.) This Court, or the district court on remand, shall have exclusive jurisdiction over any dispute with respect to any such matter, subject to the ability of the California state court to apply offsets in the *Berg v. MTC* state court action (No. BC 149408) ("*Berg* Action") as set forth in paragraph 6 below.

5. Neither BDO's settlement agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) Construed as or deemed in any judicial, administrative, arbitration, or other type of proceeding to be evidence of a presumption, concession, or an admission by BDO of the truth of any fact alleged or the validity of any claim that has been, could have been, or in the future might be asserted in the Plaintiffs' Third Amended Complaint, in the *Berg* Action, or in any other action against BDO;

(b) Offered or received into evidence in any judicial, administrative, arbitration, or other type of proceeding for any purpose whatsoever; or

(c) Construed as a concession or an admission by BDO that the Plaintiffs have suffered any damage.

6. The Court, and the district court upon remand, shall have and retain jurisdiction over the parties for all matters related to the administration, interpretation, effectuation, or enforcement of the Settlement and this Order. Should the stay be lifted in the *Berg* Action, this Order shall not preclude the state court from applying any offsets based upon the Settlement and this Order.

7. BDO's claims against any of the Non-Settling Defendants, including those asserted for contribution and indemnity, shall be preserved and are not affected by this order. (R&R at 26.)

8. There is no just reason for delay in the entry of final judgment as to BDO, and the Court hereby directs the clerk to immediately enter judgment as to this Defendant pursuant to Federal Rule of Civil Procedure 54(b).

IT IS SO ORDERED

Dated: January 7, 2002
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.:
93-CV-0876 (JG)

IN RE MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

95-CV-2499 (JG)
MDL No. 1059

THIS DOCUMENT RELATES TO
FRED KAYNE, et al.

—v.—

MTC ELECTRONIC TECHNOLOGIES
CO., LTD., et al.

—v.—

PARTIAL FINAL JUDGMENT

On January 7, 2002, the Court entered an order dismissing with prejudice all claims brought by the Plaintiffs against Defendant BDO Dunwoody ("BDO").

There are additional claims against other parties that remain in this case.

The Court specifically certifies that there is no just reason for delay of the entry of final judgment as to BDO.

Therefore, the Court ORDERS that Plaintiffs take nothing by their suit against BDO.

Furthermore, the Court hereby DENIES all relief not granted in this judgment, and directs the clerk to enter this, a FINAL JUDGMENT, as to this Defendant.

Dated: January 8, 2002
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.:
CV 93-0876 (JG)

In Re MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

Case No. 95-2499 (JG)
MDL No. 1059

THIS DOCUMENT RELATES TO
KAYNE, et al.,

Plaintiffs,

—against—

MTC ELECTRONIC TECHNOLOGIES,
CO., LTD., etc., et al.,

Defendants.

BAR ORDER, INJUNCTION AND DISMISSAL OF CLAIMS AGAINST HSBC BANK CANADA AND RONALD DRIOL

On April 24, 2001, after the matter had come on for hearing on January 23, 2001, Chief United States Magistrate Judge A. Simon Chrein issued a Report and Recommendation (the "Report") on the motion of third party

defendant HSBC Bank Canada, formerly known as Hongkong Bank of Canada ("HKB Canada") to determine, among other things:

(1) Whether the settlement between Plaintiffs in *Kayne, et al., v. MTC California Electronic Technologies Co., Ltd. et al.*, Case No. CV-95-2499 (MDL No. 1059) ("*Kayne*") and HKB Canada and Ronald Driol ("Driol"), as evidenced by the Settlement Agreement and Release between the Plaintiffs in *Kayne* (the "Plaintiffs"), HKB Canada and Driol dated as of November 30, 2000 (the "Settlement"), is a good faith settlement under federal law and California law;

(2) Whether, as a result of the Settlement, an order should issue barring all claims against HKB Canada and Driol arising out of, in connection with or in any way related to *Kayne* or the allegations therein ("Bar Order");

(3) Whether, as a result of the Settlement, an injunction should issue barring any party from proceeding in any forum with any claim against HKB Canada or Driol that is barred or would be barred by a Bar Order; and

(4) Whether, as a result of the Settlement, an order should issue dismissing any and all claims, cross-claims, counterclaims and third party complaints against HKB Canada and Driol currently pending before this Court, whether in actions originally filed in this Court or in actions transferred to this Court for consolidated or coordinated pretrial proceedings (the "Motion").

As used herein the term "Non-Settling Defendants" means and includes:

(a) All defendants, cross-defendants, counter-defendants and third party defendants, other than HKB Canada and Driol, in *Kayne* and/or any coordinated, consolidated

or related action pending before this Court, including but not limited to:

(1) *In re MTC Electronic Technologies Shareholder Litigation*, Case No. CV-93-0876 ("*In re MTC*");

(2) *Ellis, et al. v. Leung, et al.*, Case No. CV-94-1763 ("*Ellis*" and, collectively with *In re MTC* the "Class Actions");

(3) *Farr, et al. v. Hongkong Bank of Canada, et al.*, Case No. CV-963129 and/or *Farr, et al. v. Hongkong Bank of Canada, et al.*, Case No. CV-96-3130 (collectively, the "Officer and Director Separate Actions");

(4) *BDO Dunwoody v. The Grande Holdings Limited*, Case No.CV97-4950; and

(5) *Daiwa Securities America Inc. v. The Grande Holdings Limited*, Case No. CV-98-0336; and

(b) Any other person or entity that directly or through his/her/its counsel has been served with notice of the hearing on the Motion.

The Court, having considered the papers filed by HKB Canada and Plaintiffs in support of the Motion, the papers submitted by MTC Electronic Technologies Co., Ltd., now known as GrandeTel Technologies, Inc. ("MTC"), Daiwa Securities America Inc. and the "Non-Leung Individual Defendants" in opposition thereto, the Report, the objections thereto, and such other and further evidence and argument presented, by Order dated October 26, 2001 adopted the Report in its entirety with one clarification.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Each of the Non-Settling Defendants is hereby permanently barred, enjoined and restrained from commencing, prosecuting, or asserting against HKB Canada or Driol any claim or claims arising out of or reasonably flowing from the claims or allegations in the *Kayne* action, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third party claims, in *Kayne*, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency or forum in the United States, Canada or elsewhere, or in any other manner, including but not limited to offset (collectively, the "Barred Claims").

2. The following claims and actions (collectively, the "Dismissed Claims") are hereby dismissed with prejudice as to HKB Canada and Driol but are not otherwise compromised, settled, released, discharged or dismissed:

(1) The Officer and Director Separate Actions;

(2) The Amended Third Party Complaint of Defendant BDO Dunwoody filed in *Kayne*;

(3) The Third Party Complaint of Robert Farr, Peter Jensen, Thomas Lenagh and Edilberto Pozon in *Kayne* (the "Officers and Directors Third Party Complaint"); and

(4) To the extent not formally dismissed in connection with the settlement of the Class Actions in July 1998, the Amended Third Party Complaints of BDO Dunwoody against HKB Canada and Driol in *In re MTC* and *Ellis*.

3. This Court has not reached, and is not deciding, the issue of whether Plaintiffs and HKB Canada have

reached a good faith settlement within the meaning of federal or California law.

4. Any judgment obtained by the Plaintiffs in *Kayne* against any of the Non-Settling Defendants, or any party other than HKB Canada or Driol, shall be reduced by the greater of (a) the proportionate share of injury attributable to the conduct of HKB Canada and Driol, or (b) the amount of the Settlement Payment (with allocation within the gross figure to damages, prejudgment interest and attorneys' fees to be subject to the discretion of the trial court). This Court, or the District Court upon remand, shall have exclusive jurisdiction over any dispute with respect to any such matter, subject to the ability of California State Courts to apply any offsets in the Kayne State Court Action and the Berg Action as set forth in paragraph 6 below.

5. Neither the Settlement, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) Construed as or deemed in any judicial, administrative, arbitration or other type of proceedings, to be evidence of a presumption, concession, or an admission by HKB Canada or Driol of the truth of any fact alleged or the validity of any claim that has been, could have been or in the future might be asserted in Plaintiffs' Third Amended Complaint or the Kayne State Court Complaint, or otherwise against HKB Canada or Driol, or of any purported liability, fault, or other wrongdoing of HKB Canada or Driol.

(b) Offered or received in evidence in any judicial, administrative, arbitration or other type of proceeding for any purpose whatsoever, including,

but not limited to, as a presumption, concession or an admission of any purported liability, wrongdoing, fault, misrepresentation or omission in any statement, document, report, or financial statement heretofore or hereafter issued, filed, approved or made by HKB Canada or Driol or otherwise referred to for any other reason, other than for the purpose of and in such proceeding as may be necessary for construing, terminating or enforcing the Settlement (or applying the judgment reduction rule set forth herein); or

(c) Construed as a concession or an admission that the Plaintiffs have suffered any damage.

6. The Court, and the District Court upon remand, shall have and retain jurisdiction over the parties for all matters relating to the administration, interpretation, effectuation or enforcement of the Settlement and this Order including, but not limited to, resolving disputes on an expedited basis, upon motion, with respect to Sections 3.2 and 3.3 of the Settlement Agreement. Should the stay be lifted in the Kayne State Court Action or the Berg Action, this Order shall not preclude such courts from applying any offsets based upon the Settlement and this Order.

7. HKB Canada's and Driol's claims against the Non-Settling Defendants, including those asserted for contribution and indemnity, are preserved and not affected by this Order.

8. There is no just reason for delay in the entry of judgment pursuant to this Order and immediate entry of judgment by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: January 8, 2002
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.:
93-CV-0876 (JG)

In Re MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

95-CV-2499 (JG)
MDL No. 1059

THIS DOCUMENT RELATES TO
FRED KAYNE, et al.

—v.—

MTC ELECTRONIC TECHNOLOGIES
CO., LTD., et al.

PARTIAL FINAL JUDGMENT

On January 8, 2002, the Court entered an order dismissing with prejudice all third-party claims brought against Third-Party Defendants HSBC Bank Canada ("HKB Canada") and Ronald Driol ("Driol").

There are additional claims against other parties that remain in this case.

The Court specifically certifies that there is no just reason for delay of the entry of final judgment as to HKB Canada and Driol.

Therefore, the Court ORDERS that all third-party plaintiffs take nothing by their suits against HKB Canada and Driol.

Furthermore, the Court hereby DENIES all relief against HKB Canada and Driol not granted in this judgment, and directs the clerk to enter this, a FINAL JUDGMENT, as to these Third-Party Defendants.

Dated: January 8, 2002
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.
93-CV-876(JG)

In re: MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

MDL No. 1059
95-CV-2499 (JG)

THIS DOCUMENT RELATES TO:
FRED KAYNE, et al.,

Plaintiffs,

—against—

MTC ELECTRONIC TECHNOLOGIES,
CO., LTD., et al.,

Defendants.

JOHN GLEESON, United States District Judge:

Defendants BDO Dunwoddy ("BDO") and HSBC Bank Canada ("HSBC") seek orders relating to their respective contingent settlement agreements with plaintiffs in *Kayne v. MTC Electronic Technologies. Ltd.* Specifically, plaintiffs and BDO have agreed to settle claims against BDO for a total of $8,000,000, repre-

senting $4,907,975.50 in out-of-pocket damages and $3,092,024.50 in pre judgment interest. Plaintiffs have agreed to settle their claims against HSBC and Ronald Driol, a former officer of HSBC, for a total of $4,075,000, representing $1,300,000 in out-of-pocket damages, $819,000 in prejudgment interest, and $1,956,000 in attorney's fees.

The settling defendants seek a "bar order" which would prohibit further claims against them. Specifically, the settling parties seek an order which (1) finds that they have reached good faith settlements under federal and California law; (2) bars claims by "non-settling defendants" against settling defendants while reserving settling defendants' claims against non-settling defendants;[1] (3) dismisses claims pending against them in this Court, including those transferred for consolidated pretrial proceedings; and (4) approves the allocation of damages and leaves determination of any judgment reduction in favor of non-settling defendants for remand.

I referred the applications for a report and recommendation to the Hon A. Simon Chrein, United States Magistrate Judge. Judge Chrein issued his report and recommendation on April 24, 2001; familiarity with it is assumed. Judge Chrein recommended that I issue an order providing that (1) no "good faith settlement" order should issue; (2) any judgment against the non-settling defendants on the remaining claims will be reduced by the greater of (a) the amount of the settlements or (b) the proportionate share of injury attributable to settling

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[1] "Non-settling defendants" are defined as and include (1) all defendants, cross-defendants, counter-defendants, and third-party defendants in the *Kayne* action and related actions pending in this Court; and (2) any other person or entity notified directly or through counsel of this motion.

defendants; and (3) upon payment of the settlements, the non-settling defendants are barred from asserting any claims arising out of or reasonably flowing from the claims and allegations in the *Kayne* action.

The parties have filed various objections or requests for clarification or for further specification. I have reviewed their submissions as well as the record of proceedings before Judge Chrein, who held a day-long hearing on the application on January 23, 2001.

With one clarification, Judge Chrein's thorough report and recommendation is hereby adopted in its entirety. The clarification is as follows: if a judgment is obtained against a nonsettling defendant, the judgment reduction shall not necessarily be calculated by using the full amounts of the settlements. Rather, allocations of amounts within those gross figures (to damages, prejudgment interest and attorneys' fees) shall be subject to the discretion of the trial court.

As clarified. The report and recommendation is adopted.

SO ORDERED

Dated: October 26, 2001
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Master File No.

93-CV-876 (JG)

MDL No. 1059

In re MTC ELECTRONIC TECHNOLOGIES

SHAREHOLDER LITIGATION

FRED KAYNE, et al,

Plaintiffs,

—against—

MTC ELECTRONIC TECHNOLOGIES, CO., LTD., et al.,

Defendants.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE A. SIMON CHREIN

95-CV-2499 (JG)

By order dated December 6, 2000, the Honorable John Gleeson referred the above captioned matter to the undersigned Magistrate Judge for the purpose of preparing a report and recommendation concerning the appli-

cations of Defendants BDO Dunwoody and HSBC Bank Canada for orders that, *inter alia*, (a) determine that their respective contingent settlement agreements with plaintiffs in *Kayne, et al. v. MTC Electronic Technologies. Co., Ltd.* are good faith settlements; and (b) permanently bar and enjoin various claims against them. The non-Leung Individual Defendants, Daiwa Securities of America Inc., and GrandeTel Technologies, Inc. (formerly known as MTC Electronic Technologies Co. Ltd.) (collectively, the "Objectors") oppose the motions. For the reasons stated below, it is my respectful recommendation that the motions be denied in so far as the Applicants seek Orders of Good Faith Settlements but granted as to the Bar Orders, subject to the noted modifications.

BACKGROUND

On or about January 23, 1995, the Plaintiffs filed this action in the Central District of California (the "Kayne Action"). By order dated June 16, 1995, the Judicial Panel on Multidistrict Litigation (the "MDL Panel") transferred the action to this Court for coordinated or consolidated pretrial proceedings with *In re MTC Electronic Technologies Shareholder Litigation* and other related cases pending in this district before Judge Gleeson.[1]

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[1] By order dated October 14, 1998, Judge Gleeson approved settlement of the main action in *In re MTC Electronic Technologies*, 93-CV-0876, and *Ellis v. Leung* (the "Class Actions"). The settlement did not cover the Kayne Action. Additional related cases which are still pending can be categorized as follows: (1) the consolidated and stayed California state court actions, *Berg v. MTC*, No. BC 149408 (the "Berg Action"), which includes claims against BDO, and *Kayne v. HKB*, No. BC 186019 (the "Kayne State Court Action"); (2) the Officers and Directors' actions for contribution in connection with the Class Actions and the Kayne Action, *Farr v. HKB*, 96-CV-3129(JG) and 96-CV-3130(JG) (the "Officers and Directors' Actions"); (3) the

The central allegations concern misrepresentations regarding purported business ventures between MTC Electronic Technologies ("MTC") and various entities in China made to artificially inflate the value of MTC stock in anticipation of a large stock and debt offering in 1993 (the "Joint Venture Fraud"). It is further alleged that during this rise in price of MTC, MTC authorized the issuance of 1.1 million shares to non-existing engineers at no or below market cost and such stock was converted by Miko Leung and his brother, Sit Wa Leung, for their own benefit (the "Leung Stock Fraud"). Plaintiffs additionally allege that nonexistent fax sales were reported on three years of MTC's audited fmancials (the "Fax Fraud"). Finally, Plaintiffs allege that the Directors made misrepresentations in proxy materials mailed to shareholders and arranged for the Grande Group to take control of MTC without soliciting bids.

Plaintiffs have brought this action against MTC; MTC International; MTC Electronics (H.K.); Mona Electronic International; Miko Leung, MTC's former President and Chairman of Board, and Sit Wa Leung, former Secretary and Board Member (the "Leung Brothers"); Robert C. Farr, Peter Jensen, Thomas Lenagh, Edilberto V. Pozon, Ugo Doninelli, Goodwin Wang, and David Wong, former Officers and/or Directors of MTC (the "Officers and Directors" or "non-Leung Individual Defendants"); Alan Leung, son of Sit Wa Leung and former Marketing Manager; Daiwa Securities America, Inc. ("Daiwa"), the underwriter of the offering; and BDO Dunwoody Ward Mallette ("BDO"), a partnership of certified public

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Officers and Directors' action in Canada, including damage claims against HKB, *Jensen v. Leung*, No. C956589 (the "Canadian Action"); and (4) contribution actions against Grande Holding, *BDO v. Grande Holdings Ltd*, 97 Civ. 4950(JG), and *Daiwa v. Grande Holdings Ltd*, 98 Civ. 336(JG).

accountants which served as auditor during the public offering. With one exception,[2] Plaintiffs assert claims against all Defendants for violation of Sec. 10(b) of the Securities Exchange Act and Rule 10b-5, fraud, negligent misrepresentation, and violation of CAL. CORP. CODE § 25400 as well as RICO claims against all but BDO. Additionally, Plaintiffs assert claims against the Leung Brothers and the Officers and Directors for violation of Sec. 20 of Securities Exchange Act and claims against MTC, Doninelli, Pozon, Jensen and Farr for violation of Sec. 14(a) of Securities Exchange Act and breach of fiduciary duty. Plaintiffs seek to recover between $15,000,000 and $16,000,000 in out-of-pocket damages, pre judgment interest, costs pursuant to 28 U.S.C. § 1920, punitive damages in relation to the fraud claims, and treble damages and attorney's fees in relation to the RICO claims.

Daiwa, BDO, and the Officers and Directors have asserted cross-claims against MTC and the Leung Brothers. BDO and the Officers and Directors have also filed third-party complaints against, amongst others, Ronald Driol, a former officer of Hong Kong Bank of Canada ("HKB"), and HKB (now HSBC Bank of Canada, or "HSBC") for contribution under Sec. 10(b) of Securities Exchange Act of 1934 as well as contribution and/or equitable indemnity under California law based on fraud, negligence, negligent misrepresentation and violation of CAL. CORP. CODE § 25400 concerning signature guarantees by Driol. BDO has further sought to include additional allegations relating to a signature guarantee by Driol on a certificate issued to China Investment and Development Company and money laundering by Driol

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[2] The only claims asserted against Alan Leung are fraud, negligent misrepresentation and RICO violations.

and the Bank. The Officers and Directors have also filed separate actions against Driol and the Bank for contribution in connection with the Class Actions and the Kayne Action which are currently pending before this Court. *See Farr v. HKB, et al*, 96-CV-3129 and 96-CV-3130. Neither the Bank nor Driol is a direct defendant in the Kayne Action, as the Plaintiffs' motion for leave to amend the complaint to add them as defendants was denied. However, Plaintiffs have asserted claims against them, including alleged RICO violations, in California state court. *See Kayne v. HKB*, No. BC 186019.

THE PROPOSED SETTLEMENTS

Plaintiffs have reached "contingent settlements" with BDO, HSBC and Driol.[3] Plaintiffs and BDO have agreed to settle claims against BDO for a total of $8,000,000, representing $4,907,975.50 in out-of-pocket damages and $3,092,024.50 in pre-judgment interest. Plaintiffs

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[3] The settlements are in fact voidable. The settlemment agreements contain time frames under which the parties may terminate the agreement. To give non-settling defendants a reasonable period to respond and to permit this Court to adequately review the application, the deadlines set by the settling parties have not been met. While anxious to have this matter resolved, the settling parties have indicated their willingness to go forward with the settlement. The settlement agreements also allow the parties to terminate the agreements if the court order deviates from their proposal in certain respects. In breifing the matter and at oral argument, Plaintiffs raised several alternatives under which they would proceed. This Court recognizes the federal policy of encouraging settlements. While conscious that certain recommendations contained herein, if adopted, might trigger a parties' right to terminate the settlement, "[s]ettlements must not be achieved at the cost of fairness to all of the parties . . ." *In re Del-Val Financial Corp. See. Litig.*, 868 F. Supp. 547, 559-60 (S.D.N.Y. 1994).

have agreed to settle their claims against HSBC and Driol for a total $4,075,000, representing $1,300,000 in out-of-pocket damages, $819,000 in prejudgment interest, and $1,956,000 to attorney's fees.

As this is not a class action, court approval would not ordinarily be required. Court involvement is only necessary because the parties seek a "bar order" which would prohibit further claims against the settling defendants. Specifically, the settling parties request that the Court enter an order which: (1) finds that they have reached good faith settlements under federal and California law; (2) bars claims by "non-settling defendants" against settling defendants while reserving settling defendants' claims against non-settling defendants;[4] (3) dismisses claims pending against them in this Court, including those transferred for consolidated pretrial proceedings; and (4) approves the allocation of damages and leaves determination of any judgment reduction in favor of non-settling defendants for remand. The Objectors oppose the settlements on the following grounds: (1) deferring allocation and judgment credit determination is improper; (2) a good faith determination is inappropriate; (3) the proposed Bar Orders are overly broad and lack the requisite mutuality; (4) the proposed settlement allocations preclude a finding of good faith; and (5) the damage allocations are inadequate.

The matter has been extensively briefed by the settling parties and the Objectors, who have submitted memo-

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[4] "Non-settling defendants" are defined as and include (1) all defendants, cross-defendants, counter-defendants, and third-party defendants in the Kayne Action and related actions pending in this Court, including the Class Actions, the Officers and Directors' Actions, and the Grande Holdings Actions; and (2) any other person or entity notified directly or through counsel of this motion.

randa, affidavits and exhibits. Additionally, this Court heard oral arguments on January 23, 2001.[5] No party has requested to offer further evidence.

DISCUSSION

I. Generally.

A right of contribution, while mitigating the harshness of joint and several liability, may have the effect of deterring settlements. As the Second Circuit noted in *In re Masters Mates & Pilots Pension Plan and IRAP Litigation* ("*In re Masters Mates*"):

> If a nonsettling defendant against whom a judgment had been entered were allowed to seek payment from a defendant who had settled, then settlement would not bring the latter much peace of mind. He would remain potentially liable to a nonsettling defendant for an amount by which a judgment against a nonsettling defendant exceeded a non-settling defendant's proportionate share of fault. This potentially liability would surely diminish the incentive to settle.

957 F.2d 1020, 1028 (2d Cir. 1992). To remedy this problem, some jurisdictions will bar contribution or indemnity claims by non-settling defendants against settling defendants and, to compensate non-settling defendants for their loss, provide for a reduction in any judgment obtained against them by plaintiffs. *See. e.g., In re Masters Mates*, 957 F.2d at 1028; *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989). Claims may be barred

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[5] All references to the transcript of oral argument before the undersigned are herein referred to as "Tr. of 1/23/01."

even where the settling party is not a direct defendant. *See Olin Corp. v. Fisons PLC*, No. Civil A. 93-11166-MLW, 1995 WL 811961 (D. Mass. 1995); *Barton Solvents, Inc. v. Southwest Petro-Chem. Inc.*, 834 F. Supp. 342 (D. Kan. 1993); *Carpenter v. United States* 710 F. Supp. 747, 753 (D. Nev. 1988); *Mattco Forge, Inc. v. Arthur Young & Co.*, 45 Cal.Rptr.2d 581 (Cal. Ct. App. 1995) (California statute).

The most commonly used judgment reduction methods are the pro tanto and proportionate share. The pro tanto method simply reduces the judgment by the amount of the settlement, in accordance with the one satisfaction rule. *See In re Masters Mates*, 957 F.2d at 1029; *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989). While perhaps simpler to apply, there is the risk of collusion as well as the possibility of a judgment reduction inconsistent with proportionate fault, with the non-settling defendant bearing the risk of a low settlement. *See In re Masters Mates*, 957 F.2d at 1029; *Kaypro*, 884 F.2d at 1230. Some jurisdictions therefore require a showing of good faith and a hearing on culpability before approving a pro tanto settlement bar. *See In re Masters Mates*, 957 F.2d at 1029. However, the good faith hearing is not without its disadvantages. It is an inadequate safeguard if too cursory while a thorough hearing risks "bogging down the settlement process in a miniature trial before trial." *Kaypro*, 884 F.2d at 1230 (quoting *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir.1985)); *In re DelVal Financial Corp. Securities Litigation*, 868 F. Supp. 547, 561 (S.D.N.Y. 1994) ("*In re Del-Val*").

In contrast, the proportionate share method reduces the judgment by the percentage of fault attributable to settling defendants as determined at trial. *Kaypro*, 884 F.2d at 1231. Some jurisdictions apply a variation of this

rule, referred to as the "capped" proportionate share method, whereby the judgment is reduced by the greater of the settling defendants' share of fault or the amount of settlement. *See In re Del-Val*, 868 F. Supp. at 563. Under either version of the rule, the plaintiff bears the risk of a bad settlement and so has incentive to obtain a settlement accurately proportioned according to fault. Thus, determination of culpability is deferred until trial and a hearing is generally avoided. The proportionate share rule results in a credit consistent with fault because the credit is determined after a determination of liability. *See In re Masters Mates*, 957 F.2d at 1029. It is also recognized as equitable, punishing each wrongdoer according to his fault. *See Kaypro*, 884 F.2d at 1231. But like the pro tanto rule, the proportionate share rule has its disadvantages. Because the plaintiff bears the risk of a bad settlement, a holdout defendant can make settlement difficult. *See In re Masters Mates*, 957 F.2d at 1029. Additionally, the jury must assess the fault of potentially absent settling defendants, thereby providing non-settling defendants with an "empty chair" defense. *See Kaypro*, 884 F.2d at 1231. Under the pure proportionate share rule, the plaintiff may obtain a windfall while, in contrast, the hybrid rule allows for equitable considerations but also adheres to the single satisfaction rule. *See In re Del-Val*, 868 F. Supp. at 564. There is also potential for unfairness where one non-settling defendant cannot pay a judgment and the other non-settling defendants must bear the burden of paying alone. *See Fluck v. Blevins*, 969 F. Supp. 1231, 1239 (D.Or. 1997) (applying capped proportionate share rule with limited hearing to determine whether non-settling defendants were capable of paying potential judgment and, if not, whether settling defendants were paying fair share of total liability as apportioned among those defendants

who were both solvent and subject to contribution claims).

California law provides that a good faith settlement will bar claims for contribution or indemnity by non-settling defendants, who receive a pro tanto judgment reduction. CAL. CIV. PROC. CODE §§ 877, 877.6. Settling parties in the instant case, while requesting approval under California law,[6] seek to defer determination of the judgment reduction method because of the dispute as to the extent of the parties' liability.[7] Objectors oppose deferral on the grounds that failure to ascertain the judgment credits in advance precludes any determination that they will receive fair value in exchange for termination of their contribution rights. Additionally, they assert they will be prejudiced in their formulation of trial strategy.

Plaintiffs cite *In re Ivan F. Boesky Securities Litigation* ("*Boesky*") in support of the proposition that the court may defer determination of judgment reduction. 948 F.2d 1358, 1369 (2d Cir. 1991) (in accepting set-

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[6] BDO, in its memorandum in support of the present application, argues that the need for good faith analysis applies only to the state claims asserting that, "as set forth in the Order," all others will be reduced by a capped proportionate share reduction. (BDO's Mem. At 9, 11.) However, the proposed order submitted with BDO's application defers the determination of the applicable judgment reduction method. (Markel Aff. Ex. 2 ¶ 5.) Moreover, Plaintiffs have taken the position that the RICO claims are also subject to a pro tanto reduction. (*See* Pl.'s Reply at 8-9)

[7] Plaintiffs argue all Defendants are liable for all of their damages while each Defendant contends it is liable for a distinct portion of damages. (Pl.'s Mem. Supp. BDO's App. at 10-11; Pl.'s Mem. Supp. HSBC's App. at 13-14.) If Defendants' position prevails, there would be no basis to reduce the judgment.

tlement in complex securities class action which contained provision for reduction or satisfaction of any judgment against non-settling defendants to extent necessary to extinguish any claims of non-settling defendants against settling defendants, resolution of issues concerning methods of judgment reduction could be deferred). *See also South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1432 (D.S.C. 1990) (granting bar order in securities fraud class action while reserving for determination at trial method and amount of credit). The Second Circuit agreed with the district court in *Boesky* that "to address those issue [in advance] would have required the making of 'hypothetical findings of law or fact on judgments not yet obtained against nonsettling parties not now before the Court as to claims for contribution or indemnification which they might assert in determination of the liability not yet established.' " 948 F.2d at 1369. The court also based its decision on the potential choice of law questions which might preclude use of a single judgment reduction method for each non-settling defendant. *Id.* However, notably objecting plaintiffs were the appellants in the case and the court considered the fact that neither settling nor non-settling defendants objected to deferral. *Id.* Moreover, the court also affirmed denial of the objecting plaintiffs' motion for a bar order "for similar reasons." *Id.*

In contrast, the Fourth Circuit has held that, despite difficulties involved in the choice, a partial settlement which granted non-settlors a right of setoff in exchange for a bar order should not have been approved where the method of calculating the set-off was to be determined at judgment against non-settlors. *In re Jiffy Lube Sec. Litig*, 927 F.2d 155, 160 (4th Cir. 1991). *See also Fluck*, 969 F. Supp. at 1238; *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236, 1239 (S.D.Tex. 1992). The court rea-

soned that class plaintiffs needed the information to decide whether to accept the settlement. *In re Jiffy Lube*, 927 F.2d at 161. Additionally, advance notice (certainly before the close of discovery and witness preparation) of the method to be used was essential to non-settling defendants for the purpose of preparing for trial. *Id.* For example, the method used would determine the extent to which the settling defendants' wrongdoing was relevant. *Id.* Finally, failure to determine the method of reduction posed the risk non-settling defendants would receive an inadequate credit for the bar imposed. *Id.*

While requesting deferral of determination of the applicable judgment reduction method, the settling parties request that this Court make a finding of good faith under California and federal law and enter an order barring claims by non-settling defendants. Unlike *Boesky*, the non-settling defendants strongly object to deferring the issue on the grounds that they will be prejudiced. Discovery is essentially complete so there is little risk that they will be ill prepared to present evidence of settling defendants' wrongdoing. However, deferral of the issue will burden non-settling defendants with uncertainty regarding trial strategy.[8] While a finding of good faith would arguably alleviate the Fourth Circuit's concern that non-settling defendants might receive an inad-

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[8] BDO argues *In re Jiffy Lube* is distinguishable because a pro tanto reduction applies, at a minimum, to the state claims and thus nonsettling defendants will not be prejudiced by deferral because they know the settlors' fault will be relevant. (BDO's Reply at 1-3, 7 n.9.) Plaintiffs similarly assert that uncertainty exists because conflicting rules apply to the securities and RICO claims. (Pl.'s Reply at 10.) However, these arguments assume that which the settling parties seek to defer. Notably, counsel for HSBC conceded at oral argument that a determination of the appropriate judgment reduction rule is required under the above cited authorities. (Tr. of 1/23/01 at 75.)

equate credit, the settling parties' approach implicitly assumes California law applies. Accordingly, deferring determination of the applicable judgment reduction method until judgment is inappropriate under the circumstances of this case.

II. Choice of Law.

Objectors argue that a good faith finding is inappropriate, asserting that a proportionate share rule should apply to all claims pursuant to federal common law and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Settling parties, while disagreeing in some respects, all take the position that, at a minimum, a pro tanto set off applies to the state claims and the PSLRA is inapplicable.

A. Federal Rule.

In consideration of the desirability of fashioning a uniform rule to govern all claims in a single case, some courts have applied the rules of the forum state to federal claims. *See, e.g, First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenhein, Appel. Dixon & Co.* 631 F. Supp. 1029 (S.D.N.Y. 1986). However, both the Second and Ninth Circuits have decided in favor of creating a uniform national rule of settlement credits in securities cases. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (partial settlement in securities case which bars non-settling defendants from seeking contribution may be approved if liability limited to their collective share); *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989) (pursuant to single satisfaction rule, non-settling defendant is entitled to credit of settlement amount against ~~any~~ judgment obtained by plaintiff against non-settling defendant as long as settlement and

judgment represent common damages). *Cf. In re Masters Mates*, 957 F.2d 1020 (2d Cir. 1992) (in ERISA action, contribution rights against settling defendants extinguished by court approval of fair settlement bar with pro tanto credit preceded by evidentiary hearing and finding of good faith). The courts reasoned that judgment credits affect substantive rights under federal securities law, and adoption of state law would lead to disparate results and create an incentive to form shop. *Kaypro*, 884 F.2d at 1228; *Singer*, 878 F.2d at 599-600. The Third Circuit, reaching the same conclusion, further noted that "the issue is central to a federal regulatory scheme, and, therefore, national uniformity is desirable." *Eichenholtz v. Brenman*, 52 F.3d 478, 486 n.14 (3d Cir. 1995).

In 1994, the Supreme Court adopted a proportionate share judgment reduction rule in the admiralty context. *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994). While the Third Circuit has extended *McDermott* to the securities context, *see Eichenholtz*, 52 F.3d at 478, the Second Circuit has not directly ruled on the issue. *Cf. Bragger v. Trinity Capital Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994) (dismissing as moot appeal in securities fraud action and remanding to the district court to vacate rulings which were subject of appeal, adding, "it would seem unwise in the present instance to leave standing the district court ruling that any judgment against appellant be reduced on a pro tanto basis . . . in light of a recent unanimous decision of the Supreme Court [in *McDermott*] . . ."). However, several courts in this Circuit have applied a capped proportionate share judgment credit. *See Local 875 I.B.T. Pension Fund v. Pollack*, 49 F. Supp.2d 130 (E.D.N.Y. 1999) (approving settlement which would bar related claims but allow reduction in any future judgment by use of capped proportionate share method); *In re Del-Val*, 868 F. Supp. 547 (S.D.N.Y.

1994) (holding capped proportionate share rule applies to partial settlement of securities litigation and dismissing contribution claims against settling defendants).

Plaintiffs assert that there is conflicting authority in the Ninth Circuit, citing *Seymour v. Summa Vista Cinema, Inc.*, 809 F.23 1385 (9th Cir. 1987) (applying one satisfaction rule in a securities fraud action), *Kaypro*, 884 F.2d 1222 (9th Cir. 1989) (adopting a pure comparative fault credit), and *DCD Programs, Ltd. v. Leiehton*, 90 F.3d 1442 (9th Cir. 1996) (holding that, pursuant to 13 U.S.C. § 78bb(a),[9] investors could not recover damages on claims of unrealized tax shelter benefits in securities fraud action against developers of investments since they had already recovered any such damages in prior settlement from other defendants),[10] and therefore there is no uniform rule.[11] While warranting consideration, the Ninth Circuit's construction of the settlement credit rule in securities litigation does not

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[9] 15 U.S.C. § 78bb(a) provides, in relevant part, that "no person permitted to maintain a suit for damages under the provisions of this chapter [the Securities Exchange Act of 1934] shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of."

[10] While the Ninth Circuit's decision in *DCD Programs* may create doubts about the continued validity of *Kaypro*, the Ninth Circuit has not directly ruled on the issue and, in fact, declined to do so when presented with the question on procedural grounds. *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1436 (9th Cir. 1996) (declining to consider request to alter the Kaypro proportionate fault rule on the grounds that it is inconsistent with § 78bb(a) where defendant conceded applicability of Kaypro in district court and first raised issue on appeal).

[11] However, Plaintiffs appeared to argue in favor of the Kaypro proportionate fault rule during oral argument before the undersigned. (Tr. of 1/23/01 at 61.)

govern a case such as this which was transferred under the multidistrict litigation statute, 28 U.S.C. § 1407(a); rather, "a transferee federal court should apply its interpretations of federal law." *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993). *Accord In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) (Bader Ginsburg, J.), *affd. sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); *In re NASDAQ Market Makers Antitrust Litig.*, 929 F.Supp. 174 (S.D.N.Y. 1996). To the extent a pure proportionate fault rule may be inconsistent with 15 U.S.C. § 78bb(a), the hybrid rule would alleviate that conflict. *See Fluck v. Blevins*, 969 F. Supp. 1231 (D.Or. 1997) (finding conflicting authority in Ninth Circuit's decisions and applying capped proportionate share reduction with limited hearing).

Assuming some form of a proportionate share credit applies, it stands in conflict with California law, which provides for a pro tanto reduction with a fairness hearing. Plaintiffs attempt to minimize this conflict by asserting that the conflict is in fact between two federal rules, namely, the rules applicable to the securities and RICO claims. Plaintiffs cite *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.* in support of their proposition that a pro tanto credit applies to the RICO claims. *Bank Brussels Lambert*, Nos. 93 CIV. 6876, 94 CIV. 2713, 2000 WL 1364272, at *2 (S.D.N.Y. Sept. 20, 2000) (declining to extend *McDermott* to RICO context and granting motion to dismiss GOL § 15-108 defense but denying motion to dismiss fault allocation defense seeking judgment reduction under *Singer*). However, at least one court in this district has endorsed a bar order with a capped proportionate share reduction in a case alleging securities fraud as well as violations of RICO. In *Pollack*, the Court found the non-settling defendants

were adequately protected as to any possible claims by the inclusion of the judgment reduction provision. 49 F. Supp.2d at 132-33. Although the Court acknowledged the unavailability of contribution and indemnification under RICO, the judgment reduction provision in the order made no distinction between claims. *Id.* at 132 n.6, 136. Similarly, courts in other circuits have endorsed some form of the proportionate share rule in securities litigation where RICO claims were also asserted. *See Eichenholtz*, 52 F.3d at 487; *Fluck*, 969 F. Supp. at 1240; *In re Granada Partnership Sec. Litig.*, 803 F. Supp. at 1241. Accordingly, any recovery on the federal claims should be reduced in accordance with the capped proportionate share rule.

B. State Claims.

The allocation of damages on pendent state claims in federal cases should ordinarily be determined by state law because it is outcome-determinative. However, the federal rule stands in conflict with California State law, which provides for a pro tanto reduction with a fairness hearing. Objectors assert that public policy favoring uniformity and discouraging forum shopping as well as practical considerations[12] support application of some version of the federal common law "proportionate share" rule to both state and federal claims.

At least one court has addressed the problem of diverging federal and state rules of contribution bars and set-off calculations in the securities context. While

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[12] Objectors assert that under California choice of law rules, the substantive law of California may not apply. While a majority of Plaintiffs are from California, some are non-residents as are many Defendants. In reaching the recommendation contained herein, I place no reliance on such considerations.

acknowledging that federal law has not entirely preempted the field of securities regulation, the District of Massachusetts concluded the federal rule preempts the state rule which would otherwise disrupt federal policies by allowing plaintiffs to collect on a greater state award. *MFS Mun. Income Trust v. American Med. Int'l. Inc.*, 751 F. Supp. 279, 287 (D.Mass. 1990) (adopting pro tanto credit), *mod'd by In re Kendall Square Research Corp. Sec. Litig.*, 869 F. Supp. 53 (D. Mass. 1994) (adopting proportionate share rule). In the maritime context, the Central District of California also held that the federal rule preempted the state rule, citing with approval *MFS Municipal Income Trust, Slaven v. BP America, Inc.*, 958 F.Supp. 1472, 1484 (C.D. Cal. 1997). The court began by recognizing the principle that state substantive law, otherwise applicable to state claims in a federal court, "cannot be applied in those limited situations where 'there is a significant conflict between some federal policy or interest and the use of state law.'" 958 F. Supp. at 1478 (quoting *O'Melveny & Meyers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, 87 (1994)). The court then noted the recognized importance of uniformity in maritime case law and held that the federal maritime rule of contribution and proportionate share setoff, as set forth in *McDermott*, preempts application of the California pro tanto approach to settlement in the limited case where both state and federal causes of action are present and where federal causes of action will remain against non-settling defendants. *Id.* at 1483. "Should the plaintiffs eventually recover on both federal and state causes of action, the plaintiffs cannot be permitted to elect the state law settlement provisions so as to circumvent a less favorable recovery under the federal approach." *Id.* at 1484.

While there was no conflict between the federal rule ultimately adopted in *MFS Municipal Income Trust* and the relevant state law, the court's rationale has application here as does the reasoning invoked in *Slaven*. Plaintiffs note that the same underlying conduct is the basis for both the state and federal claims, and indicate an election of remedies would avoid any actual conflict.[13] Permitting Plaintiffs to elect the California settlement provisions in circumvention of potentially less favorable recovery under the federal rule would undercut the policies underlying the uniform federal rule. Notably, it would undermine the policies which supported adoption of a federal rule, by leading to disparate results and creating an incentive to forum shop in cases asserting both federal and state claims. Moreover, it would frustrate the fairness and judicial economy considerations which supported adoption of a proportionate share rule, and which selection was subsequently endorsed by Congress with the passage of the PSLRA. *See* 15 U.S.C. §§ 78u-4(f)(7)(B). I therefore recommend that the applications for bar orders be granted, subject to a capped proportionate share reduction applicable to all remaining claims. The capped proportionate share rule ensures that no matter how the settlement funds are distributed as between damages and other elements, the non-settling defendants will never be required to pay more than their proportionate share of an award as determined by the trier of fact. As the hybrid rule adequately protects the Objectors, it is unnecessary to reach the issue of whether the parties have readied good faith settlements.

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[13] Counsel for Plaintiffs stated that an election of remedies would avoid the apparent conflict between the rules applicable to RICO and securities claims. (Tr. of 1/23/01 at 53-54, 101.)

C. The Private Securities Litigation Reform Act.

The Private Securities Litigation Reform Act was passed by Congress to discourage abusive and frivolous securities litigation. *See* H.R. CONF. REP. NO. 104-369 (1995). Settlement procedure is but one area targeted by the legislation. The PSLRA provides for judgment reduction upon partial settlement of an action, adopting the capped proportionate share rule embraced in *In re Del-Val*. 15 U.S.C. §§ 78u-4(f)(7)(B). However, the PSLRA further provides for a mutual bar order, 15 U.S.C. § 78u-4(f)(7)(A)(ii), whereas, as will be discussed further below, settling defendants might otherwise be permitted to maintain contribution claims against non-settling defendants. The parties disagree as to whether the Act applies to some 19 plaintiffs added to the action, originally filed in January 1995, after the effective date of the Act.[14]

Under Section 108 of the Act, the amendments do not apply to "any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Exchange Act of 1933, commenced before and pending " on December 22, 1995. To the extent there is authority on point, it has been held that the word "commenced" in Section 108 means the date the lawsuit was filed and, thus, the PSLRA does not apply to parties added after the effective date to an action filed before the date of enactment. *See McKowan Lowe & Co. v. Jasmine, Ltd.*, 976 F. Supp. 293, 298 (D.N.J. 1997). The parties have not cited, nor have I found, any cases to the

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[14] Judge Gleeson previously ruled that the RICO amendment is inapplicable to this action. *In re MTC Elec. Tech. S'holder Litig.*, 74 F. Supp.2d 276 (E.D.N.Y. 1999). Contrary to the Plaintiffs' suggestion (*see* Pl.'s Reply at 3-4), that decision does not mandate a determination that the entire PSLRA is inapplicable.

contrary. Application of pre-PSLRA law is also logical, as applying the Act to only some claims would lead to confusion and inconsistency. I would therefore deem the Kayne Action governed by pre-PSLRA law for the purpose of resolving the damage allocation issues raised in the instant applications.

II. Scope of Bar Order.[15]

A. "Independent" Claims.

As a general rule, bar orders only extinguish "claims in which the damages are 'measured by' the defendant's liability to the plaintiff." *TBG, Inc. v. Bendis*, 36 F.3d 916, 928 (10th Cir. 1994) (order barring all claims involving, arising out of or related to any facts, matters, or transactions connected in any manner with the action impermissibly barred possible independent claims). *See also* 15 U.S.C. § 78u-4(f)(7)(A) (barring contribution claims arising out of action); CAL. CIV. PROC. CODE § 877.6(c) (barring claims for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault). "Although judgment reduction compensates a nonsettling defendant for his lost rights of indemnity and contribution, it does not necessarily compensate him for other

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[15] The settlors seek to enjoin foreign litigation as well, citing *China Trade & Dev. Corp. v. M. V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp.2d 118, 129 (S.D.N.Y. 1997), *aff'd*, 161 F.3d 115 (2d Cir. 1998); *American Home Assurance Co. v. Insurance Corp. of Ireland*, 603 F. Supp. 636, 642-43 (S.D.N.Y. 1984). Those cases recognized the power of courts to enjoin parallel proceedings in foreign forums to prevent frustration of its policies and threats to the court's jurisdiction. As the non-settling defendants have not raised any objections on this point, I would allow it.

lost claims." *In re Masters Mates*, 957 F.2d at 1033 (settlement of ERISA fiduciary duty class action that barred nonsettling trustee from bringing any claims "arising out of the hiring, retention, monitoring, performance, termination of and/or failure to terminate [investment firm], or relating in any other way to [firm]" was overly broad). Nonetheless, derivative claims disguised or artfully pleaded as direct claims may be barred. *See Bankers Trust Co. v. Rhoades*, No. 82 Civ. 5590, 1992 WL 170677, at *3 (S.D.N.Y. July 2, 1992) (approving partial settlement of ten-year old RICO action with order barring claims arising out of or related to settled claims); *Norco Delivery Servs., Inc. v. Owens-Coming Fiberglass, Inc.*, 75 Cal.Rptr.2d 456,461 (Cal. Ct. App. 1998) (after determination of good faith settlement, trial court properly dismissed cross-claims against settling defendant where non-settling defendant failed to adduce evidence of any direct cause of action); *Cal-Jones Props. V. Evans Pac. Corp.*, 264 Cal.Rptr. 737, 740 (Cal. Ct. App. 1989) (good faith settlement barred breach of fiduciary duty claim that was in effect simply an indemnity action).

The settling defendants seek bar orders precluding further related litigation against them. Paragraph 2 of the proposed orders provide that, upon payment of the settlement:

> . . . each of the Non-Settling Defendants is hereby permanently barred, enjoined and restrained from commencing, prosecuting or asserting any claim or claims based upon, relating to, or arising out of the claims or allegations in *Kayne*, including but not limited to claims for indemnity, contribution, equitable indemnity, implied in law indemnity, equitable comparative contribution based on comparative negligence or comparative fault, and partial or com-

> parative indemnity based on comparative negligence or comparative fault . . .

Notwithstanding the limitation to the claims or allegations in the Kayne Action, the orders further specify that the barred claims include but are not limited to the dismissed claims; claims based upon, relating to, arising out of or connected with the claims or allegations in the Berg Action; and claims based upon, relating to, arising out of or connected with investments by or of any of the Plaintiffs in MTC. As to HSBC and Driol, the barred claims also include claims based upon, relating to, arising out of or connected with (1) the claims or allegations in the Kayne State Court Action, the Canadian Action and *Canaccord Capital v. HKB and Driol*, No. C975722; (2) MTC stock or signature guarantees affixed to MTC stock which are the subject of certain allegations in the Kayne State Court Action and the Officers and Directors' Third Party Complaint in the Kayne Action, or MTC stock that is the subject of certain allegations in the Class Actions; (3) the additional allegations sought to be included in the Kayne Action by BDO; and (4) all banking services provided at any time by HKB and/or Driol to, for or on behalf of MTC and/or any of its last or present officers, directors and agents, including services which Ere the subject of certain allegations in the Kayne State Court Action.

This Court cannot anticipate all potential claims which might be barred by such an expansive order. For example, there might be undisclosed facts regarding banking services giving rise to a cause of action for fraud which would be timely. Or, as GrandeTel notes, the present language in the Bank's proposed order might be construed to include unrelated claims arising out of HSBC's ongoing banking relationship with GrandeTel or

claims arising out of personal banking relationships between HSBC and listed persons. (Letter from Sheridan to M. J. Chrein of 1/10/01, at 2.) However, in as much as a claim may exist against BDO in favor of Daiwa arising out of a "comfort letter" provided by BDO and which claim may have been preserved by a tolling agreement between the two parties (Tr. of 1/23/01 at 105-107, 112-13, 123-28), Daiwa is free to present evidence of the letter at trial and, to the tent the letter may have contributed to Plaintiffs' injuries, the judgment credit will adequately protect Daiwa. I therefore recommend that the orders be modified to simply bar the non-settling defendants from asserting any claims arising out of or reasonably flowing from the claims and allegations in the Kayne Action.

B. Mutuality.

Objectors assert that the bar should be reciprocal while also arguing that a proportionate share rule applies and that this Court is bound by Second Circuit construction.[16] One court in this Circuit has considered the issue and determined that settling defendants should be allowed to seek contribution from non-settling defendants, reasoning that reduction by the hybrid rule adheres to the one-satisfaction rule while permitting settling defendants to seek contribution fosters equitable apportionment of damages among defendants. *In re Del-Val*, 868 F. Supp. 547, 563-64 (S.D.N.Y. 1994). Although this Court previously approved a mutual bar order

[16] GrandeTel further notes HSBC should have no objection to a mutual bar order because they have already broadly released each other. (Letter from Sheridan to M.J. Chrein of 1/10/01, at 2.) However, HSBC has not withdrawn its opposition to a reciprocal order, even as to GrandeTel.

together with a hybrid judgment credit in *Local 875 I.B.T. Pension Fund v. Pollack*, the mutual bar there was consensual. 49 F. Supp.2d 130 (E.D.N.Y. 1999).

A rule which allows settling defendants, who are buying "peace of mind" and avoiding the costs and risk of litigation, to seek contribution from other defendants who bore the risk in the event they settled for too much seems unfair. However, this Court feels obliged to follow the only precedent in this Circuit especially given that the Objectors were on the receiving end of this benefit in the class settlement.[17] Accordingly, I would approve the provision of the settlement which preserves settling defendants' claims against non-settling defendants.

CONCLUSION

For the reasons set forth above, it is the respectful recommendation of the undersigned that the applications for Good Faith Settlement Orders be denied and the Court enter the requested Bar Orders modified to provide that upon payment of the settlements: (1) the non-settling defendants are barred from asserting any claims arising out of or reasonably flowing from the claims and allegations in the Kayne Action; and (2) any judgment rendered against the non-settling defendants on remaining claims in the Kayne Action, will be reduced by the greater of (a) the amount of the settlements or (b) the proportionate share of injury attributable to settling defendants, as shall be determined at trial.

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[17] The settlement in the Class Actions preserved claims, including those of Daiwa and the Officers and Directors, against the Leung Brothers while barring claims by the Leung Brothers. (HSBC's Reply at 8.) It should, however, be noted that the Leung Brothers' liability is the product of default.

This report and recommendation has been sent to counsel for BDO, HSBC, Kayne Plaintiffs, the Officers and Directors, Daiwa, and GrandeTel. Counsel for Plaintiffs and the settling Defendants are directed to arrange for service no later than May 4, 2001 upon all other parties appearing in these actions. Any objections to the recommendations contained herein must be filed with the Honorable John Gleeson on or before May 8, 2001. 28 U.S.C. § 636; Fed. R. Civ. P. 6, 72. The recommended bar order, if adopted, would preclude a right of contribution or indemnification by parties who might seek to recover damages from the settling defendants. It is unclear whether every potentially affected party has been notified and afforded an opportunity to be heard on the instant applications. Unless Plaintiffs or settling Defendants can establish that notice was sent, any such party has until June 5, 2001 to file objections. Failure to object will preclude appellate review.

Dated: Brooklyn, New York
April 24, 2001

/s/ A. SIMON CHREIN
A. Simon Chrein
UNITED STATES MAGISTRATE JUDGE